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No. 85-1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROGER FRANCIS DYKES, SR. AND
ROGER FRANCIS DYKES, JR.,
Petitioners,

v.

DIANA CHRISTINA DYKES AND AARON M. DYKES,
A MINOR CHILD BY HIS NEXT FRIEND,
DIANE C. DYKES, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there are sufficient questions of fact involving an illegal juvenile dependency order as to show or at least to infer a corrupt conspiracy to require a trial under 42 U.S.C. §1983?

2. Whether there are adequate state remedies available to Respondents to obviate the need for a trial under 42 U.S.C. §1983 notwithstanding a corrupt conspiracy to deprive Respondents of their civil rights in a child custody matter?

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ROGER FRANCIS DYKES, SR. et al.,

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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BRIEF IN OPPOSITION

Diana Christina Dykes, et al., Respondents, for reasons detailed herein, urge the Court to deny issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment in Dykes v. Hosemann, 783 F.2d 1000, No. 83-3347 (11th Cir. Mar.

3, 1986).

STATEMENT OF THE CASE

A. Proceedings Below

Respondents adopt and incorporate the statement of the proceedings below set forth by Petitioners (Pet. 3-5).[1]

B. Statement of the Facts

Diana Christina Dykes ("Diana") and Roger Francis Dykes, Jr. (known as "Buzzy") were married in Phoenix, Maryland on June 30, 1973. The couple resided in Gainesville, Florida, until late 1975. A child, Aaron, was born of this marriage on November 18, 1974. In December 1975, Diana, Buzzy, and Aaron moved to Monkton, Maryland. In June 1976, the Dykes moved to State College, Pennsylvania and lived there as a family until November 14, 1977

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1. References to the Petition for Writ of Certiorari itself are denoted by (Pet.) References to the Appendix included with the Petition for Writ are denoted by (Apx.).

while Buzzy attended college.

At all times relevant herein, Buzzy's father, Roger Francis Dykes, Sr. ("Judge Dykes"), was a Circuit Court judge in Brevard County, Florida. Buzzy's mother, Marilu Dykes, and Judge Dykes are divorced. Judge Dykes married Alpine Dykes in 1964 and, at all times relevant to this case, resided in Cocoa, Florida. Diana's parents, Roy and Sally Williams, have, at all times relevant to this case, resided in Phoenix, Maryland where Diana grew up and lived prior to her marriage to Buzzy.

For some time, Diana and Buzzy had been experiencing marital difficulties, (Apx. 2) and on November 14, 1977, Buzzy announced to Diana that he was taking Aaron and moving back to Florida. At the last minute he asked Diana to accompany him but she declined, stating that their home was in Pennsylvania and believing

that Buzzy would return in a few hours. Judge Dykes called Diana that evening from Florida after Buzzy left and was informed of Buzzy's departure and his intent to drive to Florida. Several other phone calls were made between Judge Dykes and Diana in the following days until Buzzy reached Florida safely with Aaron on Thursday, November 17. When Buzzy arrived at his father's house, he called Diana, but nothing was decided.

On Monday, November 21, Judge Dykes called Judge Anthony J. Hosemann, Jr. ("Judge Hosemann") either at Judge Hosemann's home or at his office (Apx. 2). Judge Hosemann was a fellow Brevard County Circuit Court judge then assigned to the Juvenile Court division with jurisdiction over delinquent and dependent children. Judge Dykes informed Judge Hosemann of the situation involving his son, grandson and daughter-in-law and asked whether it would

be possible to obtain a court order from the Juvenile Court preventing Diana from taking Aaron back to either Pennsylvania or Maryland. Judge Hosemann suggested that Buzzy come to him with a "dependency" petition and referred Judge Dykes to the Florida Department of Health and Rehabilitative Services ("HRS"), the state's social service agency charged with responsibility, inter alia, over dependent and delinquent children (Apx. 2). At some point on or before November 21, 1977, Judge Dykes composed some handwritten notes concerning the dependency petition (Apx. 21). These notes invoke the dependency jurisdiction of Judge Hosemann's court and mirror, almost identically, the petition which was presented to Judge Hosemann the next day. In addition, Judge Dykes' notes show the home phone numbers of Judge Hosemann, HRS official Thomas Weinberg ("Weinberg"), and HRS supervisor

George Rodon, an official relied upon by Judge Hosemann for advice on dependency matters.

In November 1977, Fla. Stat. §39.01 et seq., the "Juvenile Justice Act", conferred upon the juvenile divisions of Florida's circuit courts jurisdiction over delinquent children, "dependent" children, and ungovernable children.[2] A "dependent child" was a defined term in the statute, §39.01(8), and referred to an abandoned, destitute, abused, or neglected child. As part of its authority to protect dependent children, the Juvenile Court could grant custody to a third party, a social service agency (usually HRS), or in rare cases, to one of the parents (§39.11). In the overwhelming majority of cases, dependency

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2. Effective October 1, 1978, Florida's Juvenile Justice Act was amended and its provisions renumbered. Since Judge Hosemann's "dependency" order was issued on November 22, 1977, all references to the Act are to the pre-October 1, 1978 version.

petitions were instigated by HRS personnel. Once the petition was filed, the statute required summons to be served upon the parent or legal guardian (§39.06(2)). Under the statute, an adjudicatory hearing was required to be held to determine whether or not the child was "dependent" within the meaning of §39.01(8) (§39.01-(1)); such an adjudication was permissible only upon a preponderance of the evidence (§39.09(1)(b)). Subsequently, a disposition hearing was required to be held to determine the disposition of the child (§39.09(3)), although in emergency situations the two hearings were sometimes combined into one. Further, it was routine and expected that a pre-hearing investigation would be conducted by HRS (§39.09(3)). Completely separate from the Juvenile Court's power to determine custody of "dependent" children was the Circuit Court's exclusive power to determine cus-

tody of any children as an incident to its exercise of domestic relations jurisdiction once a divorce proceeding was commenced. Fla. Stat. §61.13.

Following Judge Hosemann's advice, Judge Dykes and Buzzy visited the local HRS intake office later that evening. The intake officer, the only HRS employee on duty, was Kendrick Lofback ("Lofback"). Judge Dykes explained the situation involving Aaron, Diana, and Buzzy and requested Lofback's assistance in petitioning the Juvenile Court for a custody order via a "dependency" finding (Apx. 2). Lofback explained that the Juvenile Court's authority to award custody was restricted to "dependent" children or delinquent children and since Aaron did not qualify as such within the meaning of 39.01(8), HRS could not file the petition on behalf of the Dykes. Judge Dykes was persistent, however, and Lofback finally

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called his supervisor, Weinberg, at home (Apx. 3-4). The facts were relayed to Weinberg, who concurred in Lofback's evaluation and refusal to file the dependency petition. Judge Dykes continued to persist, however, and Lofback and Weinberg finally agreed to assist the Dykes in preparing and filing a dependency petition as long as it was not officially sponsored by HRS (Apx. 4). Weinberg concedes that he might have finally told Lofback to go along with the petition idea because Judge Dykes was a judge (Apx. 4).

It was after that telephone conversation with Weinberg that Judge Dykes, Buzzy, and Lofback prepared the dependency petition. The asserted basis for seeking custody of Aaron was the "real danger" that Diana or others might try to "abduct" Aaron (Apx. 4); however, the petition did not set forth any facts or conduct by Diana to support the "real danger" claim.

Weinberg also admits that he never knew of any information that Aaron was ever mistreated or neglected.

The next morning, November 22, Buzzy met Weinberg at the courthouse as arranged. Buzzy signed the petition and Weinberg notarized it, although Weinberg admits that he never administered an oath to Buzzy (Apx. 4), nor did he make any investigation of the facts as alleged in the petition. The pair went to Judge Hosemann's chambers, Buzzy waiting outside while Weinberg presented the petition to Judge Hosemann (Apx. 4). Judge Hosemann admits that he had been expecting the petition. What followed was neither an adjudicatory nor disposition hearing before Judge Hosemann. Rather, Judge Hosemann signed the order finding three-year-old Aaron to be a "dependent child" and awarding custody to Buzzy without any receipt of evidence, any inquiry of Wein-

berg or Buzzy, or any attempt to notify Diana. Judge Hosemann admits that he had no basis for awarding custody of Aaron to Buzzy other than who his father was and the fact that the petition was presented by an HRS official, Weinberg (Apx. 4). At no time was a summons ever directed to Diana nor was Diana ever informed prior to the November 22 proceeding that a custody order would be sought (Apx. 5).

Later that day, Buzzy called Diana and informed her that he had a court order preventing Aaron's removal from Florida. Diana did not believe him because she had discussed custody matters with an attorney previously and was informed that a court could not award custody or prevent a child's removal from a state during informal separation (i.e., without a divorce action being commenced) (Apx. 5). On November 25, 1977, Buzzy returned to State College, Pennsylvania, to get his belong-

ings. Diana decided to accompany Buzzy back to Florida, both to be with her son again and to be available for service of any court orders. The couple lived at Judge Dykes' home for two weeks and then moved in with Marilu Dykes (Apx. 5-6).

Living with the Dykes proved to be unbearable for Diana, however, and on January 23, 1978, she and Aaron flew to Maryland and moved into the Williams' home (Apx. 6). Back in Florida, a frenzy of activity ensued. An attorney, Kenneth H. McIntosh ("McIntosh"), was retained to help secure Aaron's return to Florida (Apx. 6). A meeting was called by Buzzy or Judge Dykes sometime during the next three days in Judge Hosemann's chambers. Present were Judge Dykes, Buzzy, Weinberg (on his day off), McIntosh, and Michael Dey, another HRS employee (Apx. 6). Judge Hosemann joined the others in the middle of the meeting. Judge Dykes had re-

searched the newly-enacted Uniform Child Custody Jurisdiction Act, and he instructed Weinberg to call the Maryland juvenile authorities and find out if they would cooperate in using the Act to send Aaron back to Florida. At some time either before, during, or after this meeting, Judge Dykes prepared some additional notes entitled the "Plan" (Apx. 21) which listed the following steps for securing Aaron's return to Florida:

"(1) Order (Hosemann)

(2) File suit here and get temp. Order

(3) Go up to Md. w/both Orders, meet investigator, go to Youth Bureau of County Sheriff Dept. and get a Deputy to accompany and also to serve papers.

(4) Bring Aaron back home."

On January 26, 1978, Weinberg reported to Judge Dykes that Maryland authorities would not honor Judge Hosemann's "dependency" Order and that a Writ of Assistance would be necessary. The

next day, January 27, in accordance with Judge Dykes' "Plan", Buzzy filed a petition for dissolution of marriage in Brevard County Circuit Court (Apx. 6). The dissolution case was assigned to Judge Richard B. Muldrew, another fellow judge on the Brevard County Circuit Court bench (since deceased). That same morning, Judge Muldrew issued three orders ex parte: one granting temporary custody of Aaron to Buzzy; and two Requests for Assistance to the Maryland juvenile authorities (Apx. 6). Judge Hosemann also issued an ex parte order for Aaron's return and requesting the assistance of Maryland authorities (Apx. 6). All four orders were based upon and referenced Judge Hosemann's original November 22, 1977 custody Order (Apx. 6). Each judge ordered Diana to appear in a different court on February 13, 1978 at 10:30 a.m. (Apx. 6). A Maryland attorney was re-

tained to obtain a Maryland court order giving full faith and credit to these Florida orders.

On January 30, 1978, Buzzy flew to Baltimore and, armed with the Florida and Maryland court orders, seized Aaron from the Williams' home (Apx. 6). Buzzy returned to Florida with Aaron that night. This was the first time Diana ever saw a copy of Judge Hosemann's November 22, 1977 "dependency" Order (Apx. 7).

In February 1978, Diana flew to Florida to be with Aaron and to appear at a February 13, 1978 custody hearing before Judge Muldrew (Apx. 7). By this time, Judge Hosemann had relinquished his purported jurisdiction over Aaron to Judge Muldrew. On February 22, 1978, Judge Muldrew ordered a social investigation of both parents' suitability as custodians to be conducted and completed within 60 days (Apx. 7). Responsibility for conducting

the investigation was given to Mary Rodon ("Rodon"), an HRS investigator.[3] However, the report was not filed with Judge Muldrew until November 22, 1978, nine months later and only after Diana's counsel had filed a motion requesting that Rodon be cited for contempt for failing to complete the investigation (Apx. 7). When this motion was filed, Judge Dykes called Rodon to inform and assure her that he had nothing to do with the contempt motion. Rodon's report, filed two weeks after the contempt motion, made no recommendations as to custody. During all of this time, Buzzy had custody of Aaron (Apx. 7) pursuant to the four custody orders of Judge Hosemann and Judge Muldrew, a factor which Rodon admits favors the custodial parent when determining final custody.

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3. Rodon is the wife of HRS supervisor George Rodon.

On February 22, 1979, Judge Muldrew issued a final judgment granting custody of Aaron to Buzzy (Apx. 7). Judge Muldrew awarded permanent custody of Aaron to Buzzy primarily because Aaron had been in Buzzy's care and custody for more than a year (Apx. 7) as a result of Judge Hosemann's "dependency" Order, during which time Judge Muldrew found that Buzzy had met all of Aaron's needs and demonstrated his capabilities as a father (Apx. 106).

Subsequently, Diana sought post-judgment relief, including the right to take post-trial discovery, on the grounds of judicial impropriety and undue influence in the custody proceedings (Apx. 7) as evidenced by Judge Dykes' notes and newly-discovered evidence. All efforts to pursue the trail of judicial impropriety were consistently denied by Judge Muldrew (Apx. 7).

ARGUMENT

I. THE RECORD REVEALS GENUINE DISPUTES OF MATERIAL FACTS AS TO JUDGE DYKES' PARTICIPATION IN A CONSPIRACY TO DEPRIVE AARON AND DIANA OF THEIR CONSTITUTIONAL RIGHTS.

In addition to a purported lack of state action, the district court also granted summary judgment to Judge Dykes on the ground that the record failed to permit a reasonable jury to find "judicial impropriety or undue influence on the part of Judge Dykes" (Apx. 85-6).

Initially, this finding constitutes reversible error because it fails to evaluate under summary judgment standards Respondents' allegation that Judge Dykes was a willful participant in the conspiracy to wrest custody of Aaron away from Diana by unconstitutional means in violation of §1983. Liability for a conspiracy to violate §1983 attaches upon proof that a defendant "reached an understanding" to violate plaintiff's rights. Adickes

v. S. H. Kress & Co., 398 U.S. 144, 152 (1970); Crowe v. Lucas, 595 F.2d 985 (5th Cir. 1979).[4] In Adickes, a white school teacher had been denied service at a store restaurant because she was in the company of several black youths. Upon leaving the store, she was arrested. She commenced a §1983 action against the store, alleging that both the refusal of service and the subsequent arrest had been the product of a conspiracy between the store and the police to violate her right to equal protection of the laws. The trial court dismissed the action on a motion for summary judgment on the ground that there were no facts in the record to substantiate the conspiracy charge. This Court reversed, setting forth the standard

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4. Decisions of the former Fifth Circuit prior to September 30, 1981 are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

for summary judgment in a §1983 action which alleges a conspiracy involving state officials:

> Although this is a lawsuit against a private party, not the State or one of its officials, our case is made clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under §1983 if sne can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman reached an understanding to deny Miss Adickes service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes.

398 U.S. at 152 (emphasis added). This Court also held that the plaintiff had met her burden under Federal Rule of Civil Procedure 56 of showing a genuine issue of material fact by showing that "the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial, especially given the fact that the non-circumstantial evidence of the conspiracy could only come

from adverse witnesses." Id. at 157.

Here, while Respondents assert that Judge Dykes used his judicial influence to design and implement the unlawful custody plan, Judge Dykes is still liable under §1983 for "reaching an understanding" with Buzzy and others to join the conspiracy. Even if Judge Dykes had been a mute participant (a role not even remotely suggested by the undisputed evidence), this agreement by itself renders him liable to Diana and Aaron under §1983 conspiracy law.

Moreover, the evidence in the Record at least permits the inference, if not establishes that Judge Dykes was the ringleader in the conspiracy among Buzzy and others to obtain the unlawful custody orders. This evidence is documentary, testimonial, and circumstantial; and, indeed, some of it is in Judge Dykes' own

handwriting.[5] This evidence would permit a reasonable jury to find that Judge Dykes:

1. Devised the plan to gain custody by means of an illegal "dependency" Order;

2. Enlisted Judge Hosemann's participation in the conspiracy;

3. Obtained Judge Hosemann's agreement in advance to grant the "dependency" petition;

4. Went to the HRS office to secure an HRS dependency petition;

5. Enlisted Thomas Weinberg's participation in the conspiracy;

6. Used his judicial influence and power to persuade HRS personnel to co-author, present, and champion a dependency petition which they knew to be groundless;

7. Devised the January 1978 plan to enforce Judge Hosemann's ex parte Order by means of enforcement orders from the juvenile and circuit courts of Brevard County, Florida and Baltimore County, Maryland;

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5. Because of the importance of these handwritten notes, a typed copy of same is included in the Appendix hereto at 1-6.

8. Enlisted McIntosh's participation in the conspiracy;

9. Called a meeting of all the conspirators but McIntosh in January 1978 to plan and implement enforcement of the unlawful November 1977 ex parte Order; and

10. Influenced HRS investigator Rodon to delay issuance of her parental suitability report for the purpose of lengthening Buzzy's temporary custody of Aaron and thus influencing the final decree's custody decision.

The admissions, notes, and undisputed facts go beyond a mere "sequence of events," Adickes, 398 U.S. at 157. Thus, as the Eleventh Circuit in Dykes I found, it was reversible error to grant Judge Dykes summary judgment.

The Dykes' reliance on Cole v. Gray, 638 F.2d 804 (5th Cir.), cert. denied, 454 U.S. 838 (1981), is unavailing. The Dykes apparently believe that if they repeat often enough the refrain that there was no evidence to show an improper agreement with Judge Hosemann or a deprivation of

Diana and Aaron's rights, any court will believe it. The Dykes cite as proof of their innocence their deposition testimony that they did nothing wrong. The discovery depositions are replete with contradiction which, alone, should entitle the jury to determine the witnesses' credibility and veracity. Their version of the events is just their version; the undisputed facts, the disputed facts, and the permissible inferences which can be drawn therefrom permit another, and more believable conspiratorial version of events. It is the province of the jury to evaluate the Dykes' protestations of innocence along with the evidence of conspiracy. Accordingly, the district court clearly erred in summarily resolving this issue.

Moreover, the Cole case is easily distinguished on the facts. In Cole, there were no admissions by the defendants that they met and formulated a plan of

concerted action. In Cole, there were no admissions by the defendants of fraud being perpetrated upon the courts and the plaintiff. In Cole, there were no hand-written notes of the conspiracy. Here, all of these admissions and notes exist. Thus, unlike in Cole, summary judgment was wholly improper and the Eleventh Circuit so found (Apx. 21).

Neither is there conflict between the opinion of the Eleventh Circuit panel in Dykes I and the cited decisions of the First or Ninth Circuits regarding the sufficiency of allegations and proof. In Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977), cert. denied, 434 U.S. 1077 (1978), a member of a credit union who was sued (successfully) in a collection suit, brought suit against the state court judge, his clerk, the constable, and three other individuals, under Section 1983, alleging conspiracy. Unlike the situation

in Dykes I, the plaintiff in Slotnick was not only unable to plead facts supporting his claim of violation by defendants of state procedures, but he was also unable to refer to material facts in support of his claim of a conspiracy. In the case sub judice, Respondents have not only demonstrated that the Florida dependency statute was violated by Petitioners in both spirit and procedural content, but they have also produced documentary, testimonial and circumstantial evidence of a conspiracy, at least to the extent to enable them to be allowed to proceed to trial. As to Aldabe v. Aldabe, 616 F.2d 1089 (9th Cir. 1980) (". . . appellant simply did not allege any facts showing the deprivation of any constitutional or other legal rights", 616 F.2d at 1092). In contrast with the situation in Aldabe, Respondents herein have demonstrated that rights have been violated by the conspira-

torial actions and inactions of Petitioners and others, summarized by the Eleventh Circuit in Dykes I as follows:

> The gravamen of Diana's complaint and her basis for appeal is that her parental rights were terminated without notice and a hearing by means of an official act of a judge, which was the product of a corrupt conspiracy between the judge and the other appellants. Diana correctly points out that "the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." "[S]tate intervention to terminate [such a] relationship . . . must be accomplished by procedures meeting the requisites of the Due Process Clause." At a minimum, due process requires timely notice, in advance of a hearing in which parents' rights to custody are at stake. Furthermore, "before a person is deprived of a protected interest, he must be afforded an opportunity for some kind of hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justified postponing the hearing until after the event.'"
>
> * * *
>
> Here, Diana alleges, and the other parties do not dispute, that Diana was not given notice or a hearing before the dependency ad-

> judication deprived her of custody of Aaron. She also alleged that the dependency adjudication was the product of a corrupt conspiracy between a judge and private parties. We conclude that Diana has at least stated a §1983 procedural due process claim.

Dykes v. Hosemann, 743 F.2d 1488, 1493-94 (11th Cir. 1984) (Apx. 9-10) (citations deleted).

II. THE RECORD CONTAINS EVIDENCE ESTABLISHING GENUINE DISPUTES AS TO BUZZY DYKES' PARTICIPATION IN THE CONSPIRACY.

The district court's conclusion that no facts showed Buzzy to be a wilful participant in the conspiracy (Apx. 95) does not withstand even a cursory review of the evidence. Buzzy Dykes attended and participated in every meeting held among the conspirators, including the November 21, 1977 meeting at the HRS office to obtain the "dependency" petition, the November 22, 1977 meeting with Weinberg at the courthouse, and the January 1978 meeting in Judge Hosemann's chambers where the

return of Aaron to Florida pursuant to Judge Hosemann's "dependency" Order was planned. In addition, the evidence establishes Buzzy's active participation in the plan, as he accompanied his father on the mission to secure the fraudulent HRS petition, averred that he had signed the petition under oath when he had not, and flew to Maryland to regain custody of Aaron. Indeed, the whole purpose of the custody scheme was to gain for Buzzy custody of Aaron at the expense of Diana. It would be stretching credulity to hold, on the basis of the undisputed facts, that the conspirators' actions were taken without Buzzy's consent, knowledge, or participation. The evidence compels a contrary conclusion. The district court's characterization of Buzzy's role in the conspiracy, therefore, is totally unwarranted. Rather, this is a fact issue for the jury, as determined by the Eleventh Circuit in

Dykes I (Apx. 21-2).

III. ANY STATE REMEDIES AVAILABLE TO RESPONDENTS, WHICH WERE ADEQUATE TO PROTECT THEIR RIGHTS, HAVE BEEN EXHAUSTED.

In their Petition, the Dykes perpetuate two fantasies: first, that Diana was somehow given "actual" notice of the November 22, 1977 "dependency" order; and second, that no "actual" harm occurred to Diana or to Aaron as a result thereof (Pet. 15). As to the concept of lack of harm, actual or otherwise, one need only remember that it was the initial dependency order that spawned the uninterrupted custody of Aaron in favor of Buzzy for well over a year (Apx. 5-7). And prior custody was the primary reason for the award of permanent custody in Buzzy which has existed now for over seven years.

Concerning notice, Diana was never served with Judge Hosemann's November 22, 1977 custody order until well after the time to appeal had expired. The so-called

"actual" notice of the order which Buzzy gave Diana by phone the following day and upon which Petitioners place great reliance does not suffice as proper notice as a matter of law or fact. Proper notice is that notice

> reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.**** The notice must be of such nature as reasonably to convey the required information, . . .

Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950) (citations omitted). Thus, for example, written notice of pending utility service termination was found insufficient under the Due Process Clause where it failed to advise utility customers of their right to object. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14-15 (1978). This vague "notice" by Buzzy during a phone conversation of a court order preventing Aaron being taken

from the State of Florida does not comply with the Mullane requirements. It failed to apprise Diana (1) that the issue of custody had been adjudicated; (2) that her right to custody of her natural son had been abrogated; (3) that her husband had been awarded custody of her son; (4) that she had any right to appeal this custody award; or (5) that she had a right, under Florida law, to separate adjudicatory and dispositional hearings as to Aaron's custody. If a written notice of impending utility service termination offends the Due Process Clause because it fails to advise the recipient of a right to appeal, surely an ambiguous verbal notice which misrepresents a court order adjudicating parental custody rights and fails to advise the recipient of a right to appeal also offends the Due Process Clause.

Additionally, contrary to Petition-

ers' assertions, neither the Florida trial court, the Florida District Court of Appeals, nor the Florida Supreme Court ever ruled on or "resolved" Diana's judicial impropriety claim (Pet. 15). Rather, Judge Muldrew consistently denied Diana's attempts to take discovery on this issue. The Florida appellate court took note of the claim but, not surprisingly given Judge Muldrew's refusal to permit discovery, refused to consider it because of a lack of evidence on the issue. The Florida Supreme Court denied certiorari. For Petitioners to block successfully Diana's attempts in state court to ferret out evidence of judicial impropriety and then argue before this Court that she had full opportunity in state court to litigate the issue lacks candor if not cheek.

Further, the Florida courts' rulings (or, more precisely, lack of rulings) on Diana and Aaron's constitutional claims do

not preclude the federal courts from considering them under §1983 because of res judicata. Res judicata only operates where there is an identity of issues and parties. Maher v. City of New Orleans, 516 F.2d 1051, 1056-58 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976). Here, the state courts were adjudicating a custody issue, not the deprivation of Diana and Aaron's constitutional rights of privacy and Due Process. In addition, Aaron was the subject of, but not a party to, the state court custody proceedings. Since there was no final state court judgment on the issue of violation of Diana and Aaron's constitutional rights and no identity of parties, res judicata is wholly inapplicable.

Petitioners rely upon Ellis v. Hamilton, 669 F.2d 510 (7th Cir.), cert. denied sub nom., Ellis v. Judge of Putnam Circuit Court, 459 U.S. 1069 (1982), for support

of their dual argument that (1) federal courts should leave most domestic relations cases to state-court resolution and (2) remedies exist at the state level for the harm done to Diana and to her son by Petitioners, especially where custody is at issue.

The question of custody is not now, nor ever has been, the object of the present action. Diana and Aaron concede, to their regret and sorrow, that a final, non-appealable custody order has been entered and affirmed by the state courts of Florida denying permanent custody of Aaron to his natural mother, Diana. In this action, Diana and Aaron seek compensatory and punitive damages for Petitioners' conspiratorial conduct in violation of Diana and Aaron's civil rights which caused the state custody order to come about. In short, the "machinery of correction" anticipated by Ellis was never

able to be put into motion as a result of the "ruthless speed" of Petitioners and others.

As to federal intervention in cases originating in a family-law context the Ellis court stated:

> -We are well aware that the Supreme Court has made inroads in recent years into this once secure preserve of states' rights. No longer can it be said that "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not the laws of the United States."

669 F.2d at 515.

CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS B. BURCH
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(301) 539-6606
(Counsel of Record and Counsel
for Respondents)

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409 Washington Avenue
Towson, Maryland 21204
(301) 494-9000
Counsel for Respondents

JUDGE DYKES AND OTHERS' NOTES REGARDING CUSTODY "PLAN"

APPENDIX 1

(Notes made back in Nov.)

The parties sep. when after months of hostility, and strained relations, P'er was obligated to return home to Florida after terminating a college course. Rs declined to accompany P'er and the minor child and elected to remain behind, having theretofore stated that P'er should take the child and his belongings and leave.

P'er is fearful that an effort may now be made by and on behalf of Rs to come into Fla. without warning, and by force or by trick, to take the child out of the state; and, therefore that the child is in jeopardy of injury if an immediate remedy is not afforded by temp. injunction and/or by an order of temp. custody in P'er.

Judge Hosemann
home 783-1269

George Rodon
heads program

(Judge Dykes handwriting)

APPENDIX 2

Tom Weinberg (home) 636-0341
Ken McIntosh (home) 322-7703

Order for Hearing to produce child - Juv. Court Md. Juv. Office serve papers up there Md. Dep. Sher. accompany to serve summons and Order of Temp. Custody and Notice of Hearing.

File suit in Circuit Court here and obtain temp. custody order w/Order to produce child.

Get atty in Baltimore to stand by.

Buzzy fly up to Balt., rent a car, meet officer and go to Williams house.

or Buzzy go w/o help, surprise them and take Aaron.

1) what if Diana and Aaron not there?

2) what is best time of day? Williams' habits?

3) what if they stall and call their lawyer
Private investigator?

APPENDIX 3

E.L.A. Vol. 9
Divorce #290
Habeas Corpus #48
Parent & Child #2(5)
Infants #18

CJS Divorce #303
CJS Habeas Corpus #54,71, etc.
CJS Infants #5 et seq. #96,99
CJS Parent & Child #13

70 ALR 3d 262
9 ALR 2d 434
4 ALR 2d 7

Plan

1) Order (Hosemann)

2) file suit here & get temp. Order

3) go up to Md. w/both Orders, meet investigator, go to Youth Bureau of County Sheriff Dept. & get a deputy to accompany & also serve papers

4) bring Aaron back home

231 A.2d 27
* 284 A.2d 271
* 284 A.2d 654
354 A.2d 454
* 330 A.2d 488

Reminder

(Re-Roger Dykes)
Tom W.-Pat Morris of Baltimore, MD called and said the state of Maryland would not honor the juvenile court order. Person has to get a writ of attachment from Florida, advise him to clear with Lt. Tenn of the Youth Bureau of Police Department 301-494-2150.

1/26/78 Cindy
11:00 a.m.

Attorney Ken McIntosh called -

He wanted to bring to your attention 1977 Regular Sessions Laws
Chapter 77-433, House Bill #650
"Uniform Child Custody Jurisdiction Act"

Also the Assistant State Attorney in Sanford - Norman Levine used to be a research assistant for a district court judge in Balitmore, Md. Mr. McIntosh thinks he might be able to help.

1) can he get any sort of Orders

2) local Judges attitude

3) local investigator

Max Stadfeld
Blum, Yumkas, Mailman
Gutnan & Derrick
Phone (301) 539-4151
Home (301) 265-6645

APPENDIX 5

* Mr. Boaz in Baltimore
* Mrs. Blake in adoption
  Miss Morse protective services

Will they check the Registry up there?

Experience under the Uniform Custody Act in picking up a child for return to the state from which taken.

Social workers not the answer

Tom Weinberg Intake Supervisor
636-2933

1) Review felony statute @ your Dad

2) Take a) copy of statute
   b) copy of your custody order and your Dad to juvenile judge about this matter.

(Potential help from Maryland)

3) Consider <u>all</u> ramifications of trip to Baltimore.

4) Report progress to me.

Registrar - Johns Hopkins University

Uniform Juvenile Custody Act

APPENDIX 6

Max Stadfeld * 1006---> 3004
301-539-4151
10 Light Street
Suite 2900
Baltimore

Monday January 30, 1978 @ 11:00 AM

Retainer 350.00

Investigator will bill Baltimore firm.

Travel Confidential -

Eastern Air Lines . Creative Divorce

Flt # 632 Krantzler
Lv ORL 0700

/Dollar Rent A Car/

Return

Flt # 439 EAL
Lv BALT 9:35 PM